of heroin. The aggregate would bring the total amount of heroin found within the provisions of section 39A.

Drug taking is a menace and drug trafficking and pushing is becoming so rampant. Persons indulging in such activities are a scourge to society and unless the courts consider deterrence and the public interest as vital factors in sentencing, what would result would be a virtual licence for the kingpins of organisations in the drug trade to use young persons as a front not only in the hope that they themselves would escape punishment but also that the age of these hench-boys would deter the courts from sending them to prison. Unless the courts take a firm stand in the matter the whole purpose of the legislature in enacting in its wisdom section 39A of the Ordinance which imposes a minimum mandatory term of imprisonment of 3 years and a maximum of 14 years would be lost.

The facts of this case would clearly appear to suggest that the respondent is not merely an addict but an operator of somewhat greater significance, may be a pusher, may be even a trafficker, considering the amount and quantity of the drugs found in his possession.

In all the circumstances I do not think, much as I regret having to interfere with the sentence imposed by the subordinate court, that section 294 of the Criminal Procedure Code is the appropriate provision to apply. I would therefore set aside the order made by the learned President and impose on the respondent a sentence of imprisonment for a term of 3 years.

Appeal allowed.

Solicitors: *Thevin, Chandran & Siva.*

LAM KOK TRADING CO. (PTE.) LTD. & ANOR. v. YORKSHIRE SWITCHGEAR & ENGINEERING CO. LTD.

[O.C.J. (Abdul Hamid J.) October 10, 1975]
[Kuala Lumpur — Civil Suit No. 406 of 1974]

Practice and Procedure — Jurisdiction of court — Contract made outside jurisdiction — Breach of contract outside jurisdiction — Whether court in Malaysia has jurisdiction — Courts of Judicature Act, 1964, s. 23.

This was an application to set aside the writ of summons and all subsequent proceedings on the ground in effect that the courts in Malaysia have no jurisdiction to deal with the matter. In this case the contract was made outside the jurisdiction, the defendant was resident outside Malaysia and had no place of business within the jurisdiction and the breach of contract also occurred outside the jurisdiction.

Held: the court had no jurisdiction to deal with the matter and therefore the application must be allowed.

Cases referred to:-

(1) *Evans Marshall & Co. Ltd.* v. *Bertola and Independent Sherry Transporters Ltd.* [1973] 1 Lloyds Reports 453; [1973] 1 All E.R. 992.

(2) *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] 1 All E.R. 694.

(3) *Jackson* v. *Spittall* (1870) L.R. 5 C.P. 542.

(4) *Cuban Atlantic Sugar Sales Corporation* v. *Compania de Vapores San Elefterio Limitada* [1960] 1 All E.R. 141.

CIVIL SUIT.

R. R. Sethu for the plaintiffs.

Henry Cheah and *Chin Yew Meng* for the defendants.

Abdul Hamid J.: The defendants Yorkshire Switchgear and Engineering Company, Limited are applying for an order pursuant to Order 12 rule 30 of the Rules of Supreme Court, 1957 that the writ of summons and service of the writ of summons and all subsequent proceedings be set aside on the ground that — (a) the parties to the agreement dated February 12, 1970 made between the defendants and the second plaintiffs (I shall hereafter call "the said agreement") have submitted to the jurisdiction of the English Court in that they have agreed that the proper law of the said agreement shall be the law of England; alternatively (b) that the proceedings herein be stayed on the ground that the parties hereto have agreed in the said agreement that all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching these presents or the subject-matter thereto or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to arbitration in England in accordance with the provision of the Arbitration Act, 1950 of England or any re-enactment or statutory modification thereto for the time being in force.

Encik Henry Cheah counsel for the defendants/applicants in his affidavit of October 2, 1974 in support of the application referred to the said agreement whereby the second plaintiffs were appointed agents for the sale of all products manufactured by the defendants and such other goods and merchandise as may have been mutually agreed between them.

Under the said agreement the second plaintiffs agreed that payments by the defendants in respect of commissions on all products sold by the second plaintiffs be made in sterling. It was also a term of the said agreement that any dispute arising as to the amount of commission payable by the defendants to the second plaintiffs shall be settled by the auditors of the defendants.

Encik Henry Cheah pointed out that the defendants are a company with a limited liability, incorporated in England with a registered office at Meanwood Road, Leeds 6, England, and had not at any time established a place of business in Malaysia. Encik Cheah also pointed out that it was agreed that the said agreement shall in all respects be interpreted in accordance with the law of England.

It is the defendants' contention that in view of the provisions of the said agreement the proper law of this contract is the law of England and the writ issued by the court should therefore be set aside.

Alternatively and without prejudice to the foregoing it is the defendants' contention that this dispute ought to be referred to arbitration in England under Clause 13 of the said agreement in accordance with the Arbitration Act of England and the defendants were and are still willing to do all things necessary for the conduct of the arbitration.

It is submitted that the first plaintiffs were at all material times an associate company of the second plaintiffs and are bound by the said agreement.

An affidavit in reply was affirmed by Robert Ng Soo Lam of No. 43, St. Patrick's Road, Singapore, 15, the managing director of both the first and the second plaintiffs. He admitted paragraphs 1 to 8 of Encik Henry Cheah's affidavit. However, it is the plaintiff's contention that even if English law was the proper law of the contract this court is not precluded from trying the action according to English law.

It is also contended that — (a) the breach of contract on which the action is founded occurred within the jurisdiction of the court and (b) one of the claims in the action is for an injunction to restrain the defendants from appointing any other agent in Malaysia.

It is submitted that the said agreement no longer subsists and has been terminated. Pursuant to some negotiations certain disputes were settled between the parties and the dispute as to breach of contract by the defendants was expressly reserved under an agreement dated October 26, 1973 between the plaintiffs and the defendants.

The plaintiffs contend that the defendants cannot rely on the arbitration clause in the said agreement after maintaining it is ended. Alternatively they contend that Clause 4 of the agreement dated October 26, 1973 supersedes the arbitration clause in the said agreement.

The plaintiffs also contend that the proper law applicable in the circumstances of this case is the Malaysian law as the breach complained of occurred in relation to performance of the contract in this country. Mere mention of law as the law applicable to a particular contract is not conclusive and English law cannot be held to apply to the facts and circumstances of the dispute and even if English law was held applicable to the dispute this court is equally able to apply English law to the facts of the dispute.

At the hearing of this application Encik Henry Cheah drew my attention to section 23 of the Courts of Judicature Act, 1964 the relevant portion of which reads —

"23. (1)... the High Court shall have jurisdiction to try all civil proceedings where —

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the court...."

At the very outset it seems clear that paragraphs (b) and (d) of subsection (1) of section 23 are inapplicable to the present case.

The only questions before the court are whether (a) the cause of action arose, or (b) the facts on which the proceedings are based exist or are alleged to have occurred, within the local jurisdiction of the court, *i.e.*, in Peninsular Malaysia.

In the instant case it is apparent that both agreements were not entered into between the parties in Peninsular Malaysia and furthermore it is revealed from the correspondence between the parties that the facts on which the proceedings are based, namely, the whole of the ingredients leading to, indeed the whole of the circumstances surrounding the termination of the contract, did not exist within the local jurisdiction. It is therefore my finding that paragraph (c) of section 23(1) cannot apply to the present case. As such I will only proceed to determine whether the cause of action arose within the local jurisdiction of this court.

Encik Henry Cheah submitted that the action in this court relates to a breach of contract arising out of termination of contract and the breach clearly arose either in England or Singapore.

Encik Henry Cheah referred to two letters RNSL1 and RNSL2 annexed to Robert Ng Soo Lam's affidavit both of which were addressed to Inex (Pte.) Limited, Singapore (second plaintiffs) on December 14, 1972 and May 29, 1974 respectively. The relevant portion of RNSL1 reads —

"Following written notice of termination of the agency agreement which you gave us on June 10 last, we now write to confirm, on the expiry of the notice required under paragraph two in the agency agreement dated February 12, 1970, that our association is now formally ended.

With effect from this date, we are no longer bound to any exclusive agreement..."

The relevant portion of RNSL2 reads —

"As you know we maintain that the Agency Agreement between yourselves and ourselves dated February 12, 1970 is no longer subsisting.... Moreover the remainder of the agreement was terminated by mutual agreement in June 1972 and we rely in particular upon the written notice given by you dated June 10, 1972. We would strongly dispute any allegation on your part that such notice did not constitute valid termination and refer you to our letter of December 14, 1972... without prejudice to our contentions we hereby give you formal notice terminating all express and implied contractual connections with you whether comprised in the Agency Agreement of February 12, 1970, any variation thereof or any other acts and events giving rise to an agreement, written or oral.

We contend that this notice should take effect immediately as summary notice since you have committed a number of serious breaches of the agreement between us.... We have been given advice that summary notice should be given, but if a competent court of law or arbitration should however decide that you are nonetheless entitled to six months notice of termination then we hereby give you six months notice to take effect six months from today. We also understand that it has been suggested that Lam Kok Trading Company (Pte.) Limited of Singapore and Lam Kok Trading Company (Pte.) Limited of Malaysia (associated companies of yours) have at some time had contractual connections with us of a kind similar to an agency. This is emphatically denied but if a competent court of law or arbitration should decide that there have been acts or events giving rise to such a relationship between ourselves and these companies, notice is hereby given formally terminating the same."

On the other hand Encik Sethu argued that the plaintiffs are relying on the agreements of February 12, 1970 and October 26, 1973 and the second agreement has brought in Lam Kok Trading as a party to the arrangement. It is the plaintiffs' contention that so long as the contract relates to the performance in this country, and, this is prevented, the breach occurs in this country. In support of his argument Encik Sethu cited the case of *Evans Marshall & Co. Ltd.* v. *Bertola And Independent Sherry Importers, Ltd.*[1]

With all due respect I fail to see any merit in the argument by counsel for the plaintiffs. In the first place, I find the facts in the case cited by counsel so dissimilar to the facts of the instant case that they can easily be distinguished from the facts of the present case. Furthermore I am unable to see how that case can have any bearing upon the point at issue. As for the agreements referred to by Encik Sethu it is a fact that both were concluded in England and although the second agreement brought in Lam Kok Trading as a party to the arrangement, it is evident that the breach, if any, essentially arose under the first agreement concerning which Lam Kok Trading was not a party Lam Kok Trading was only brought in as a party to the second agreement by reason of the fact that they were associates of the second plaintiffs and to my mind this fact does not *prima facie* establish a cause of action enabling Lam Kok Trading to institute an action against the defendants in this country. The substance of the case was the dispute that arose as a result of the agency under the agreements between the defendants and the second plaintiffs. Perhaps it is appropriate at this point that I should briefly deal with the plaintiffs' contention that the proper law applicable in the circumstances of this case is the Malaysian law as the breach complained of occurred in relation to the performance of the contract in this country.

In this connection I wish to emphasise that the main and substantial issue in dispute is the termination of the agency under the first agreement and on the materials before the court, I am unable to find any *prima facie* evidence, other than mere suggestion, that Lam Kok Trading had contractual relations with the defendants. Clause 4 of the second agreement vests the first and second plaintiffs with the right to make such claims as they deem fit in relation to the dispute recited in recital 4(a) whether by court proceedings or otherwise. Nonetheless the "dispute" in question relates essentially to the validity of the purported determination of the agency agreement, *i.e.*, the first agreement entered into between the defendants and the second plaintiffs. In that event the necessary implication would be that "court proceedings or otherwise" referred to in Clause 4 of the second agreement must mean court proceedings as envisaged under Clause 13 of the first agreement whereby both parties mutually agreed that that agreement shall in all respects be interpreted in accordance with the laws of England, thus vesting exclusive jurisdiction in the English Courts to hear and adjudicate any action founded upon a breach under that agreement if it is committed within the jurisdiction of such courts.

Encik Sethu then cited the case of *Distillers Co. (Bio-Chemicals) Ltd.* v. *Thompson*[2] in support of his contention that the cause of action arose within the local jurisdiction. It was held in that case that —

(i) It was not necessary that every ingredient of the cause of action should have occurred within the jurisdiction, nor was it necessary, or sufficient, that the last ingredient, *i.e.* that which completed the cause of action, should have occurred within the jurisdiction; what was necessary was that the act, or omission, on the part of the first defendant which gave the plaintiff his cause of complaint should have been performed within the jurisdiction.

(ii) In the present case that act complained of was the failure to give a warning that the goods would be dangerous if taken by an expectant mother in the first three months of pregnancy; the plaintiff was entitled to complain that this warning had not been communicated to persons in New South Wales and it was this omission which gave rise to the cause of action which, therefore, arose within the jurisdiction.

Encik Chin Yew Meng who appeared in place of Encik Henry Cheah on behalf of the defendants at the continued hearing argued that *Distillers Co. (Bio-Chemicals) Ltd. Thompson's* case, *supra*, cannot apply to the present case. He pointed out that neither agreement was executed nor the letter of termination received by the plaintiffs within the local jurisdiction. In the case of *Distillers Co. (Bio-Chemicals) Ltd.* v. *Thompson, supra*, the action was one in tort, the plaintiff bringing an action in negligence against the first defendant a company incorporated in Great Britain manufacturing pharmaceutical products and against second defendant company which marketed and sold the products in Australia. The product was consumed in Australia.

Lord Pearson in his judgment approved and applied the decision in the case of *Jackson* v. *Spittall*[3] describing it as highly authoritative. At page 700 Lord Pearson referring to three possible theories set out earlier on in the course of his judgment at page 698 said —

"The third theory is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint, has occurred within the jurisdiction. That is the rule laid down in *Jackson* v. *Spittall*, which is an authoritative case, and the rule is inherently reasonable, as the defendant is called on to answer for his wrong in the courts of the country where he did the wrong. The rule does not, however, provide a simple answer for all cases. In *Jackson* v. *Spittall* the wrongdoing was a breach of contract and there was no difficulty in determining where it occurred. The court did not have to consider where the wrong act should be considered to have taken place in an action for negligence. The defendant does not merely by behaving negligently give the plaintiff any cause for complaint in law. The plaintiff has such a cause for complaint if the defendant's negligence has caused damage to the plaintiff. In the great majority of cases the place where the defendant is negligent is the same as the place where the negligence causes damage to the plaintiff."

And further on His Lordship observed that —

"In the present case on the assumptions made for the purpose of testing jurisdiction there was negligence by the first defendant in New South Wales causing injury to the plaintiff in New South Wales."

With reference to the passage I have just cited I take the liberty to emphasise the observation of Lord Pearson that "In *Jackson* v. *Spittall* the wrongdoing was a breach of contract and there was no difficulty in determining where it occurred." I would hasten to add that it should also be observed that the second limb of subsection (4)(a) of section 18 of the Common Law Procedure Act of New South Wales No. 21 of 1899, as amended, specifically provides as follows—" . . . or in respect of breach of a contract made within the jurisdiction; . . . . "

In the present case I do not see the necessity to consider further the submission made by Encik Sethu on the question of performance. The case of *Cuban Atlantic Sugar Sales Corporation* v. *Compania De Vapores San Elefterio Limitada*[4] cited by Encik Sethu in fact lends weight to the well-settled principle that

in contract the question is whether the breach has been committed within the local jurisdiction. At page 143 Lord Hodson L.J., said —

"... The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been been committed in the United Kingdom;"

At page 145 Ormerod L.J., concurring with the judgment of Hodson L.J., observed as follows —

"... Counsel for the defendants at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under R.S.C., Ordinance 11 rule 1 should be administered with the greatest care, as it is a rule which tends to encroach on the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction."

In the present case it is my considered judgment that for reasons that I have stated, the breach of contract, if any, has not been committed within this court's local jurisdiction. I would therefore allow the application and set aside the service of the writ with costs.

Application allowed.

Solicitors: *Chin, Sethu & Co.; Allen & Gledhill.*

SEET SOH NGOH v. VENKATESWARA SDN. BHD. & ANOR.

[O.C.J. (Chang Min Tat J.) October 15, 1975]
[Kuala Lumpur — Civil Suit No. 1611 of 1974]

Contract — Agreement to build and sell — Purchaser claiming for specific performance — Progressive payments at various stages made by purchaser — Developer claiming for payment in excess of what it was entitled to at material time — Whether developer could repudiate agreement.

Injunction — Registration of transfer to 3rd party — Prevention of — Registrar of Titles may be ordered to lodge caveat — Whether damages adequate remedy — Court to preserve status quo — National Land Code, ss. 319 & 320(1)(a).

The plaintiff purchased a piece of land from the first defendant, the developer, who contracted to build a house on it. It was agreed between the plaintiff and the first defendant that progress payments were to be made by the plaintiff at various stages of the building. At the material time, the plaintiff had paid to the first defendant more progress money than it was entitled to. The first defendant sought to repudiate the agreement on the ground that the plaintiff had no money to complete the purchase.

The plaintiff filed an action for specific performance of the said agreement and various orders of injunction to prevent the registration of the transfer of the property to a third party. The Registrar of Titles was joined in as the second defendant. The plaintiff obtained an order for injunction against both the first and second defendants and further orders requiring the second defendant to lodge a Registrar's caveat. The first defendant sought to set aside the said injunctions.

Held: (1) section 320(1)(a) of the National Land Code empowers the Registrar of Titles to enter his caveat to prevent fraud and improper dealing, and if such a possible dealing is brought to the notice of the court and the Registrar is before the court, the court can order him to do so;

(2) the first defendant had no right to repudiate the agreement and rely on a cause (that the purchaser had no money to complete the purchase) which had not arisen;

(3) damages would not be an effective remedy having regard to the tremendous increase in the value of land and the costs of construction and in the circumstances if would be prudent to preserve the *status quo;*

(4) the respective orders for injunction and for Registrar's caveat will stand and the first defendant will pay costs of the application to the plaintiff.

Cases referred to:-

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 2 W.L.R. 316 H.L.(E).

(2) *Fellowes & Son* v. *Fisher* [1975] 3 W.L.R. 184 C.A.

CIVIL SUIT.

M. L. Chan for the plaintiff.

Sri Ram for the first defendant.

Mohamed Saari bin Yusof (Federal Counsel) for the second defendant.

Chang Min Tat J.: This action is for specific performance of an agreement to build and sell a house together with the land on which it is to be built. It is one of several against the developer.

The short facts of the case are this:

Both parties entered into a written agreement of sale. By the terms of the agreement the payments were regulated as follows:

(1) On the execution of the agreement a sum of $5,000;

(2) On the commencement of the foundation a sum of $2,000;

(3) On the commencement of brick-works a sum of $2,000;

(4) On the commencement of roof-works a sum of $2,000;

(5) On the commencement of plastering a sum of $2,000;

(6) On the commencement of painting a sum of $2,000; and

(7) On the commencement of the water and electrical installation a sum of $2,000.

These progress payments added up to $17,000. The total purchase price was $33,000, the balance of $15,000 being payable on the completion of the building. However, at the relevant time the plaintiff had paid a total sum of $18,500 even though as is alleged in the Statement of Claim, the brick-works had just been commenced and the developer was not entitled at this stage to more than $9,000. If there had been any variations so far agreed in the methods of payment they had therefore been made for the benefit of the developer.

On the November 21, 1974, the developer addressed a letter to the plaintiff in the following terms:

"We are now at the commencement of roofing and water pipe installations. We therefore shall be pleased if you will kindly forward us $10,000 towards the above shophouse within (7) days from date hereof. We are to inform you that as materials have to be bought for cash your prompt payment shall be much appreciated."

Consequent on the receipt of this letter, the plaintiff telephoned Miss Kamala Devi, a Director of the firm and also an Advocate and Solicitor of the High Court of Malaya. What that conversation was about is a matter of some dispute.